Supreme Court, U.S.
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02-707 (3)

No.

In the

Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

ARCHON CORPORATION,
formerly Santa Fe Gaming Corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTION PRESENTED

A complaint was filed in United States District Court. The complaint alleged a federal claim (a violation of Title III of the Americans with Disabilities Act of 1990, or "ADA"), and alleged no state law cause of action. The federal claim was the subject of: (1) briefing before the District Court; (2) the decision of the District Court; (3) briefing before the Court of Appeals; and (4) oral argument before the Court of Appeals. A state law cause of action was not mentioned at any point in the pleading, briefing, or argument of the case. In the Court of Appeals' disposition affirming the District Court's grant of dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court of Appeals did not address the issue presented for review (the scope of remedies available regarding a violation of Title III of the ADA). Instead, the disposition of the Court of Appeals was limited to a pronouncement that relief for a particular state law claim (common law "unjust enrichment") was not available under the facts alleged in the complaint.

The question presented is whether a Court of Appeals may affirm dismissal of the case by ignoring the federal issue presented for review and, accordingly, by ignoring that court's duty to hear and decide the case.

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I. RESPONDENT MISAPPREHENDS THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI

Respondent's Brief in Opposition ("Oppo.") begins with an ironic attempt to redraft the "Question Presented" so as to suggest that the availability of "money damages" in the private enforcement of Title III of the ADA was the federal question presented to the Ninth Circuit for review. Oppo. at i. The irony is that the Ninth Circuit effectively redrafted the Complaint in this case and, in doing so, failed to address the issue that *was* presented to it. That issue was not the availability of "money damages," but the availability of *disgorgement*.[1]

Respondent's own version of the "Question Presented" may constitute an informal conditional cross-petition for a writ of certiorari on the scope of remedies in the private enforcement of Title III of the ADA, that the Court may wish to consider if the Petition is granted. Typically, however, "in the absence of consideration of [a] matter by the Court of Appeals, [this Court will] not consider it." *Meyer v. Holley*, 537 U.S. ___, ___, No. 01-1120, slip op. at 11 (January 22, 2003), citing *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970). The Ninth Circuit never addressed the availability of a disgorgement remedy in ADA Title III cases. Indeed, no

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[1] Indeed, Respondent attempts the proverbial "strawman" argument, as Disabled Rights has *never* contended that the remedial provisions of Title III of the ADA provide for awards of money damages for private litigants. *See, e.g.*, App. at 18a ("Santa Fe cites a host of cases for the proposition that 42 U.S.C. § 2000a-3(a) does not provide for *damages*. . . . This point of law is clear, and Plaintiffs *agree* that no damages are allowed under 42 U.S.C. § 2000a-3(a)."(emphasis in original)).

circuit court of appeals has addressed that matter. Cognizant of this Court's precedents[2], Disabled Rights has chosen to limit the scope of the question presented in an effort to obtain a GVR order so that the Ninth Circuit will have a second opportunity to address the matter that was presented to it for review.

II. RESPONDENT'S CONCLUSION THAT THE NINTH CIRCUIT ADDRESSED THE ISSUE PRESENTED TO IT FOR REVIEW IS BASED UPON RESPONDENT'S ERRONEOUS BELIEF THAT "DISGORGEMENT" AND "DAMAGES" CONSTITUTE INDISTINGUISHABLE FORMS OF "MONETARY RELIEF"

Respondent contends that "the Ninth Circuit addressed whether disgorgement is an appropriate remedy under Title III of the ADA." Oppo. at 8. That contention is, however, refuted by the Ninth Circuit itself. In its memorandum disposition, the Ninth Circuit expressly stated that it "need not decide any broader question" where it chose to look at the "circumstances of the case" in the light of a state law claim for "unjust enrichment." App. at 2a. Accordingly, the Ninth Circuit did *not* consider the availability of disgorgement as a remedy for the private enforcement of Title III of the ADA. Respondent, however, is trapped in the belief that disgorgement and monetary damages are indistinguishable forms of "monetary relief." Thus, Respondent has cited to the Ninth Circuit's recitation of the truism that "[d]amages are not an available remedy for a violation of Title III of the ADA" (Oppo. at 9, citing App. at 3a) as proof that the Ninth Circuit considered whether *disgorgement* is an available remedy for a violation of

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[2] *See, McCray v. New York*, 461 U.S. 961, 963 (1983) (it is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.") (STEVENS, J., respecting denial of petitions for writs of certiorari).

Title III of the ADA.

Respondent's confusion between "disgorgement" and "damages" is not limited to Respondent's reading of the Ninth Circuit's holding in this case. Respondent also argues that *all* forms of monetary relief -- legal (such as damages) and equitable (such as disgorgement) are precluded where money damages are precluded. Oppo. at 9-12. Disabled Rights briefed the Ninth Circuit regarding the distinction between legal and equitable forms of monetary relief (*see, e.g.*, App. at 19a-28a), but the Ninth Circuit chose not to address the issue.[3]

III. THE CONSTITUTION'S CASE-OR-CONTROVERSY REQUIREMENTS ARE MET BY DISABLED RIGHTS IN THIS CASE.

Respondent contends that "if the requirements of standing are abrogated at some point in the proceeding, the dispute is moot." Oppo. at 6. This Court, however, has distinguished the case that Respondent relies upon (*United States Parole Commn. v. Geraghty*, 445 U.S. 388, 397 (1980)) and has noted that "[c]areful reflection on the long-recognized exceptions to mootness . . . reveals that the description of mootness as 'standing set in a time frame' is not comprehensive." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000). The proper analysis of standing and mootness is to first determine

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[3] *This* Court, however, has recently addressed the distinction between legal and equitable forms of restitution and has held that the imposition of personal liability for a contractual obligation to pay money constitutes legal relief. *See, Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The disgorgement remedy sought in this case, of course, is not based upon contract, is not measured by Disabled Rights' loss, and is not (necessarily) even payable to Disabled Rights. Clearly, the remedy is equitable.

whether the plaintiff "had Article III standing at the outset of the litigation . . . before turning to mootness." *Id.* at 180.

A. Disabled Rights Has Standing in this Case.

Citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), this Court has noted that an association has standing to bring suit on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., supra* at 181.

Respondent does not dispute: (1) that Mr. Ronald Ray Smith sustained an injury in fact due to his encounter with inaccessible bus service at the Santa Fe Hotel & Casino; (2) that Mr. Smith's injuries were cumulative until Respondent sold the Santa Fe Hotel & Casino and related buses in an asset sale; (3) that at all relevant times, Mr. Smith was a member of Disabled Rights; nor (4) that the interests at stake are germane to the purpose of Disabled Rights. Rather, Respondent asserts that both the claim asserted and the relief requested require the participation of individual members in the lawsuit.

Respondent's argument against Disabled Rights' standing is centered on an analysis of *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 884 F.Supp. 487, 488-489 (S.D. Fla. 1994) where an "association of over fifty parents and volunteers organized to protect the rights of people with disabilities to recreational opportunities in the City of West

Palm Beach," *Id.* at 488, brought suit under *Title II* of the ADA.[4] The district court in *Concerned Parents* noted that establishing a violation of Title II of the ADA "requires proof as to each individual claimant. In addition, the relief afforded to each claimant would require an individualized assessment of what measures the City must take in order to comply with the ADA on a case-by-case basis." *Id.* at 488-489, and accordingly found that the plaintiff association could not "establish associational or representational standing to sue on behalf of its members under the three-prong analysis set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)." *Id.* at 488.

Unlike the alleged violation of Title II of the ADA at issue in *Concerned Parents*, the violation of Title III of the ADA that is at issue in this case is plainly defined -- without reference to any "individualized assessment." *See*, 42 U.S.C. § 12182(b)(2)(B). Furthermore, the relief requested (originally, an injunction and disgorgement of wrongful gains, but

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[4] Respondent cites to several cases where organizations (including Disabled Rights) have had standing to act as representatives of their members in ADA Title III cases. *See, e.g., Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203 (D.Nev. 1998) (Disabled Rights Action Committee was plaintiff with standing) and *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 761-763 (D.Or. 1997) (where a non profit disabled rights group was included as a plaintiff, the plaintiffs would "have standing to seek injunctive relief to redress the alleged violations of Title III" even in areas that "[i]t is unlikely that any individual plaintiff will ever . . . use."). Respondent does not attempt to explain why associational standing was appropriate in those cases, but not in this case. Moreover, Respondent does not attempt to explain why associations of *disabled* persons should be denied standing that has been accorded to other associations (*e.g.*, associations of apple growers (as in *Hunt v. Washington State Apple Advertising Comm'n, supra*) and associations of environmentalists (as in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., supra*)). Clearly, Article III of the Constitution does not provide a basis for judicial discrimination against associations of disabled persons.

presently only disgorgement) plainly does not require the participation of an individual member in the lawsuit. Thus, Disabled Rights had standing at the outset of the litigation.

B. The Relief Sought in This Case is Not Moot

Disabled Rights has noted that an asset sale has "rendered moot any prospective injunctive relief that might have been ordered in the case." Petition at 4, n. 3. The mootness of a requested *injunction*, however, does not preclude a court from entering an order for the *disgorgement* of wrongful gains. *See, Powell v. McCormack*, 395 U.S. 486, 496, n. 8 (1969) ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests.")

The issue presented to the Ninth Circuit for consideration was the availability of disgorgement as preventive relief under the "other order" language of 42 U.S.C. § 2000a-3(a). In a case concerning similar statutory language, this Court stated that:

> a decree compelling one to disgorge profits acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked. * * *.
> An order for the recovery and restitution of illegal rents may be considered a proper "other order" under either of two theories:
> (1) It may be considered as an equitable *adjunct to an injunction decree* * * *.
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act."

Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (emphasis added).

Clearly, the disgorgement remedy is adjunct to injunctions as it is aimed at deterring further wrongdoing. Deterring Respondent from future violations is moot with regard to the bus system that it operated *at the Santa Fe Hotel & Casino*. Nevertheless, as this Court has noted: "Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter v. Warner Holding Co., supra* at 400. While Respondent no longer owns the Santa Fe Hotel and Casino, Respondent is still in business and still owns and operates public accommodations (including another casino in Clark County, Nevada). Indeed, Respondent has made no effort to meet it's "formidable burden of showing that it is absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., supra* at 190. Because it is a disputed matter as to whether Respondent's ADA Title III violations will recur, preventive relief in the form of disgorgement is not moot. *See, id.* at 193.

IV. RESPONDENT MISAPPREHENDS DISABLED RIGHTS' ARGUMENT REGARDING THE PROPRIETY OF THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Respondent has read Disabled Rights' argument for the exercise of this Court's supervisory power (*see*, Petition at 17-22) as an assertion that the Petition should be granted "simply because the Ninth Circuit decided this case in an unpublished opinion." Oppo. at 12. Apparently, Respondent reads Disabled Rights' description of the Ninth Circuit's practice of using "unpublished dispositions 'to achieve the same end' as a grant of 'discretionary review authority,'" (Petition at 20, quoting *Hart v. Massanari*, 266 F.3d 1155, 1177 (9th Cir. 2001)) as an assertion that certiorari *must* be granted when sought with regard to an unpublished opinion. Clearly, that is not what Disabled Rights has asserted. Instead, Disabled Rights

has argued that *in this case*, the Ninth Circuit has used its rightful authority to decide cases by means of an (unpublished) "Memorandum" disposition to achieve an improper end: the avoidance of the circuit court of appeals' duty to decide a case presented to it for review.

Disabled Rights' attention to the unpublished nature of the opinion below addresses the decisional procedure which provides the opportunity for circuit courts to avoid their duty to decide cases -- not to assert that all (or even a substantial fraction) of cases disposed of by "Memorandum" are not truly "decided" by circuit courts of appeals. Clearly, if the Ninth Circuit had issued the memorandum disposition below as a published opinion, the error would be the same. *See*, Petition at 20. It is, however, very unlikely that a circuit court of appeals would *publish* an opinion that so plainly avoids deciding the issue presented for review. Thus, in practical terms, the question presented for review will never be presented to this Court *except* on a petition for certiorari to review an unpublished opinion.

After attempting to reformulate Disabled Rights' argument in support of the exercise of this Court's supervisory power, Respondent contends that "there is absolutely no legal support for Disabled Rights' tenuous position." Oppo. at 12. For the argument that Disabled Rights *has* made, however, there is remarkably strong legal support, as a court's *jurisdiction* is inextricably intertwined with its *duty to decide* cases presented to it. Or, as phrased by this Court two hundred years ago: "[i]t is emphatically the province *and duty* of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177-178 (1803) (emphasis added).

The principle enunciated by Chief Justice Marshall (speaking for a unanimous Court) two centuries ago is clearly not limited to establishing this Court's *jurisdiction* to interpret

the Constitution: this Court has consistently reaffirmed that part and parcel to a court's *jurisdiction* (or, "province") to hear a case is that court's *duty* to decide the case. *See, e.g., Clinton v. Jones*, 520 U.S. 681, 703, 710 (1997) ("'[i]t is emphatically the province and duty of the judicial department to say what the law is.' . . . The Federal District Court has jurisdiction to decide this case. Like every other citizen who properly invokes that jurisdiction, respondent has a right to an orderly disposition of her claims."). *See also, Pierson v. Ray*, 386 U.S. 547, 553-554 (1967) (The duty to decide cases provides the basis for judicial immunity).

CONCLUSION

Whether by mistake or by design, the Ninth Circuit did not decide the case that was presented to it for review. Under 28 U.S.C. § 1291, the courts of appeals are conferred with "jurisdiction of appeals from all final decisions of the district courts of the United States." Under *Marbury v. Madison*, the grant of jurisdiction to the courts of appeals includes a concomitant duty to decide the cases properly presented to them. For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted, the decision below should be vacated, and the case should be remanded to the Ninth Circuit so that the court of appeals may fulfil its duty to decide the case that was properly presented to it for review.

Respectfully submitted.

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